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No. 85-1581

In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SOLORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether certain offenses charged against petitioner—the sexual assault of the dependent children of fellow servicemen who were assigned to the same military command as petitioner—had a sufficient connection with the military to empower a court-martial to try him for those offenses.

2. Whether the military and civilian prohibitions against the sexual abuse of children gave petitioner sufficient notice that the conduct charged against him was criminal.

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OPINIONS BELOW

The opinion of the United States Court of Military Appeals (Pet. App. 1a-17a) is reported at 21 M.J. 251. The opinion of the United States Coast Guard Court of Military Review (Pet. App. 18a-42a) is reported at 21 M.J. 512.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on January 27, 1986. The petition for a writ of certiorari was filed on March 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

A general court-martial was convened by the Commander of the Third Coast Guard District in Governors Island, New York, to try petitioner for 21 specifications charging him with various acts of sexual child abuse, in violation of Articles 80, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 928, and 934. At a pre-trial hearing, the military judge granted petitioner's motion to dismiss 14 of the specifications for lack of jurisdiction (Pet. App. 3a-4a, 55a-61a). Pursuant to Article 62, UCMJ, 10 U.S.C. (Supp. II) 862, the government appealed that ruling to the United States Coast Guard Court of Military Review, which reversed the trial judge's ruling and reinstated the specifications (Pet. App. 18a-42a). Petitioner thereafter sought review by the United States Court of Military Appeals, which granted review and affirmed the decision of the Coast Guard Court of Military Review (Pet. App. 1a-17a). After both the Court of Military Appeals and the Chief Justice denied petitioner's request for a stay of the proceedings, the court-martial reconvened on February 18, 1986. On March 11, 1986, petitioner was convicted on eight of the 14 specifications involved in the interlocutory appeal, as well as on four other specifications of sexual child abuse. He was sentenced two days later to confinement at hard labor for 12 months, to a reduction in pay-grade, and to a bad conduct discharge.

1. From 1982 to 1984, petitioner was stationed in the Seventeenth Coast Guard District in Juneau, Alaska, and served as a member of the Commander's staff (Pet. App. 20a). The number of Coast Guard personnel stationed in Juneau is far less than the

number of military personnel found at typical installations of other services, and there is no "base" or "enclave" where Coast Guard personnel live and work. Except for a small facility that could house a small number of officers and enlisted personnel,[1] there are no living quarters for Coast Guard personnel in Juneau, and virtually all Coast Guard military personnel in Juneau live in the civilian community (*id.* at 20a-21a n.1).

The offenses that were the subject of the motion to dismiss all occurred in petitioner's privately owned home in Juneau between March 1982 and June 1984 (Pet. App. 20a). The victims were two young girls, between ten and 12 years of age at the time the offenses occurred. The fathers of the girls are active duty members of the Coast Guard. At the time of the offenses, the girls' fathers were also assigned to the Seventeenth District and worked in the same building as petitioner. *Id.* at 10a, 20a; Tr. 43-44, 60-61. The victims' families lived in civilian housing, one next door to petitioner, another one-half mile away (Pet. App. 20a). The two victims frequently visited petitioner's house (*id.* at 21a; Tr. 46-47). During their visits, petitioner committed numerous acts of sexual abuse, including fondling, indecent assault, and several attempted rapes of one of the victims. This pattern of abuse continued over a two-year period until petitioner was transferred by the Coast Guard from Alaska to its base at Governors Island, New York (Pet. App. 14a, 21a-22a; see also Tr. 9 (addendum)).

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[1] There is a small facility that has a pier for a Coast Guard buoy tender that can house six officers and 49 enlisted personnel (Pet. App. 20a-21a n.1).

Following petitioner's transfer to New York, he sexually abused the young daughters of two other fellow Coast Guardsmen (Pet. App. 22a, 36a-38a; Tr. 9 (addendum)).[2] During the investigation of those on-base offenses in New York, the crimes in Alaska first came to light (Pet. App. 21a). The State of Alaska was contacted concerning its interest in prosecuting the offenses that occurred there. The District Attorney's Office in Juneau responded that it would defer prosecution in favor of the Coast Guard (App., *infra*, 3a).[3] Petitioner was ultimately charged with various offenses that were alleged to have occurred in both Alaska and New York.

2. a. Before trial, petitioner moved to dismiss the Alaska-based specifications on the ground that the court lacked jurisdiction over those offenses under *Relford* v. *Commandant*, 401 U.S. 355 (1971), and *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). At a session of the court-martial on June 3 and 4, 1985, the military judge conducted an evidentiary hearing on the motion. Evidence was introduced at the hearing on the effect of the crimes on the young girls who were abused (Pet. App. 10a; Tr. 52, 59, 63, 65). In addition, the victims' fathers testified as to the emotional impact of the crimes on them personally. As a result of the crimes, the evidence showed that the duty performance of these otherwise superior servicemen suffered (Pet. App. 10a-11a; Tr. 48, 50, 64, 65, 66-67). One father testified that the experience was far more devastating than the 13 months that

[2] These incidents provided the basis for petitioner's convictions for the on-base offenses.

[3] The letter from the Alaska District Attorney's office was introduced as an exhibit in the lower courts (Pet. App. 34a) and is reprinted as an appendix to this brief (App., *infra*, 1a-4a).

he spent as a combat soldier in Vietnam (Tr. 66-67). The evidence demonstrated that the fathers could not work in the same unit with the accused again (Pet. App. 11a; Tr. 49, 66). The testimony concerning the emotional effect on the victims and their families was also supported by expert opinion (Tr. 75-78). As a result of the offenses, both the victims and their servicemen parents required extensive psychological counseling (Pet. App. 10a, 22a; Tr. 48, 49, 52, 63, 64-65). Evidence was also adduced that public awareness of such crimes would damage the reputation of the Coast Guard in the civilian community, at least in the short run, risking the loss of credit and job opportunities presently enjoyed by Coast Guard personnel stationed in Juneau (Tr. 22-23, 34, 36, 37-39).

b. After hearing the evidence, the military judge granted the motion to dismiss the Alaska specifications and announced his findings on the matter (Pet. App. 55a-61a). Concluding that none of the factors identified in *Relford* v. *Commandant*, *supra*, supported the exercise of court-martial jurisdiction over the Alaska child abuse offenses, the trial judge dismissed those charges (Pet. App. 61a-63a).

3. On the government's appeal, the Coast Guard Court of Military Review reversed the military judge's ruling and reinstated the Alaska charges (Pet. App. 18a-42a). In its decision, the court of military review found that several of the trial judge's findings were unsupported by the evidence and clearly erroneous as a matter of law (*id.* at 28a-35a).[4] The court concluded that "[t]he offenses

[4] Petitioner often refers to the trial judge's findings (Pet. 4, 6-7, 9-10), but he fails to recognize that the court of military review found that several of those findings were incorrect as a matter of law (Pet. App. 32a-35a).

by their very nature contained within them the potential for a disrupting effect on good order and discipline" (*id.* at 32a) and that the offenses "directly impacted upon good order, discipline, morale and welfare of servicemembers and their families" (*id.* at 33a). The court held that "as a matter of law, the Coast Guard's interest in deterring these offenses is distinct from and greater than that of the Alaskan authorities and that the judge erred in finding to the contrary" (*ibid.*). The court also found that the trial judge had "overlooked the possible unique and distinct effect" on the military of its inability to prosecute a serviceman for the type of offenses with which petitioner was charged (*id.* at 33a-34a). Likewise, relying on the letter of the Alaska assistant district attorney, which stated that Alaska would defer prosecution of petitioner in favor of the Coast Guard, the court found clear evidence of the civilian authorities' lessened interest and ability to vindicate the military's disciplinary interests (*id.* at 34a).

The court then turned to the legal question whether there was a sufficient connection between the Alaska offenses and the interests of the military to support court-martial jurisdiction under the criteria listed in *Relford* v. *Commandant*, *supra*. Examining the charged offenses, the court found that, although the offenses were not committed within the confines of a military "base," they were nonetheless "violations against persons associated with one particular Coast Guard command" (Pet. App. 35a). A single Coast Guard command, the court explained, "is more than a physical place or property; it is an organization of people," for whose security the commander is responsible (*ibid.*). It was appropriate for the military to be concerned with the security of its "command," rather than simply a particular "base," the court concluded, "in light of the unique facts presented here—a military presence without the traditional base" (*id.* at 36a). If the facts of this case were analyzed in that manner, the court concluded, all of the factors listed in *Relford* would support the exercise of court-martial jurisdiction (*id.* at 35a-36a).

The court found it unnecessary to analyze the case in that fashion, however, because it held that two of the *Relford* factors supported the exercise of court-martial jurisdiction in this case: "the responsibility and authority of a military commander for maintenance of order in the command and the need to have court-martial jurisdiction to support that authority and responsibility when there is the possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern or capacity for vindicating that authority" (Pet. App. 36a-38a; see *Relford*, 401 U.S. at 367-368). In so ruling, the court emphasized that the similarity between the Alaska and New York sexual offenses "presents a pattern of behavior which poses a real threat to families" in the vicinity of the New York Coast Guard facility (Pet. App. 36a-37a), that the commander of the Coast Guard's New York facility had a "compelling" interest in resolving all of the charges against petitioner swiftly (*id.* at 37a), and that the "paramount interest of the Coast Guard" was evidenced by the fact that all of the parties were still members of "the Coast Guard community" (*id.* at 37a-38a). Accordingly, the court held that the Alaska child abuse charges were "service connected" within the meaning of *Relford*, *O'Callahan*, and *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975).

4. Petitioner thereafter sought review by the Court of Military Appeals. After granting review, that court also found that the Alaska offenses were within the jurisdiction of a military court-martial (Pet. App. 1a-17a). The Court of Military Appeals noted that not every off-base offense against a servicemember's dependent can be prosecuted by a court-martial (*id.* at 12a), but it found that "sex offenses against young children * * * have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned" (*ibid.*). In ruling that these offenses could be tried by a court-martial, the court of appeals relied on a number of factors (*id.* at 10a-16a): the emotional and financial impact on the parents—especially the servicemember fathers—and the victims; the effect on the morale and discipline of the military unit, both where the parties were stationed when the offenses occurred, and where the parties might thereafter serve; the lessened interest of civilian authorities in prosecution due to the military transfers of the victims and the accused away from Alaska; and the benefits to petitioner, the victims, and the Coast Guard from trying the similar off-base (Alaska) and on-base (New York) offenses together. Considering these factors in light of *O'Callahan* and *Relford*, the court of appeals concluded that petitioner could be tried by a court-martial on the Alaska child abuse offenses (*id.* at 16a).

ARGUMENT

The decision of the Court of Military Appeals is correct, it does not conflict with any decision of this Court, and it involves a jurisdictional issue that has no impact beyond the military justice system. Furthermore, petitioner's contentions are not ripe for this Court's review: petitioner's convictions have not yet been reviewed on direct appeal, and one of the questions in the petition was not raised in any of the lower courts. For these reasons, review by this Court is not warranted.

1. This case is currently in an interlocutory posture. The Court of Military Appeals rendered its decision on a government appeal from the trial judge's dismissal of the charges against petitioner. Following that court's decision, petitioner was convicted and sentenced. Petitioner's sentence includes a term of confinement in excess of six months and a bad conduct discharge. If that sentence is upheld by the convening authority (see Art. 60, UCMJ, 10 U.S.C. (& Supp. II) 860), petitioner's convictions and sentence will be reviewed by the Coast Guard Court of Military Review under Article 66 of the UCMJ, 10 U.S.C. (& Supp. II) 866. If that court rules against him, petitioner will again be able to seek review by the Court of Military Appeals under Article 67 of the UCMJ, 10 U.S.C. (& Supp. II) 867. Because a favorable decision by either court below on petitioner's pending appeal may render moot the claims that he has raised in his petition, review by this Court at this time would be premature.

The record on petitioner's appeal from the judgment of conviction also provides a more complete factual background against which to consider the

claims presented in the petition. Contrary to petitioner's assertion (Pet. 20), the trial on the merits has produced additional facts that are relevant to the issue of jurisdiction.[5] Accordingly, on petitioner's upcoming appeal, the Court of Military Review will be able to apply its expertise to the more complete factual record of the case, so as to present a better record for subsequent review. See *Schlesinger* v. *Councilman*, 420 U.S. 738, 760 (1975) (noting that whether an offense is subject to prosecution by court-martial is a "matter[] as to which the expertise of military courts is singularly relevant"); see also *id.* at 760-761 n.34. There is therefore no need for this Court to decide the claims presented by petitioner in the current posture of this case.

Petitioner maintains (Pet. 19) that review by this Court is necessary at this time because a service-member defendant may petition for a writ of certiorari only from a judgment of the Court of Military Appeals. Petitioner contends that his opportunity to seek review by this Court will be frustrated if the Court of Military Appeals declines to review his case again. That claim, however, is not persuasive.

When Congress gave this Court certiorari jurisdiction in military cases, it gave the Court jurisdiction to review only the judgments of the Court of Military Appeals, and not the courts of military re-

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[5] We are informed that, for example, additional evidence of the impact of the offenses on the victims' families, which the Court of Military Appeals considered significant (Pet. App. 10a-12a), was developed during the trial testimony of the victims' mothers, who did not appear at the pretrial hearing. It was also revealed during the trial that one of the victims had considered suicide.

view. Congress restricted this Court's jurisdiction in that fashion to ensure that the cases coming to this Court would be only those involving issues of substantial national importance. See S. Rep. 98-53, 98th Cong., 1st Sess. 8-11, 33-34 (1983); H.R. Rep. 98-549, 98th Cong., 1st Sess. 16-17 (1983). If the Court of Military Appeals were to decline to review petitioner's case following the affirmance of his conviction, it would put petitioner in precisely the same position as if the court of military review had ruled against him in the first instance and the Court of Military Appeals had declined t review that ruling. The fact that the Court of Military Appeals has a screening function that is designed to limit the number of military cases reaching this Court should not provide a justification for relaxing the usual principles counseling against review of interlocutory decisions.

In any event, the Court of Military Appeals has been sensitive to the fact that it must grant review before a defendant may seek review in this Court. Consistent with congressional concern as to the role that it plays in the process (S. Rep. 98-53, *supra*, at 34), the Court of Military Appeals has in some cases granted review and summarily affirmed on the basis of its own longstanding precedents that have never been reviewed by this Court, apparently in order to allow the defendant to seek review in this Court. See, *e.g.*, *United States* v. *Spicer*, 20 M.J. 188 (1985), cert. denied, No. 84-1978 (Oct. 21, 1985); *United States* v. *Simmons*, 21 M.J. 38 (1985), cert. denied, No. 85-857 (Feb. 24, 1986); *United States* v. *Holman*, 21 M.J. 149 (1985), cert. denied, No. 85-963 (Jan. 13, 1986).

Moreover, the decision by the Court of Military Appeals not to review petitioner's case would not

prevent him from obtaining review of his claims by a federal court. Petitioner can collaterally attack his convictions by filing a petition for a writ of habeas corpus in federal district court, as Congress recognized when it limited direct review in this Court from the judgments of the military courts. See S. Rep. 98-53, *supra*, at 32-33.

2. On the merits, petitioner's claims do not warrant further review. The courts below correctly applied this Court's decisions to the facts of this case, and petitioner has not presented any sufficient reason to justify further review.

The Constitution (Art. I, § 8, Cl. 14) empowers Congress to provide for the court-martial of servicemen for committing crimes. Whether an individual serviceman may be tried by a court-martial for a particular crime turns on whether, on the facts of the case, the offense and the underlying conduct sufficiently affect the interests of the military as to be "service-connected." *Councilman*, 420 U.S. at 760; *Relford* v. *Commandant*, 401 U.S. 355, 365-369 (1971); *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). That inquiry requires a court to gauge "the impact of an offense on military discipline and effectiveness, * * * whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and * * * whether the distinct military interest can be vindicated adequately in civilian courts." *Councilman*, 420 U.S. at 760. This undertaking involves "matters of judgment that often turn on the precise set of facts in which the offense has occurred," as to which "the expertise of military courts is singularly relevant" (*ibid.*). See also *Relford*, 401 U.S. at 365-366 (adopting "an *ad hoc* approach to cases where a trial by court-martial is challenged"). The ruling below that petitioner can be tried by a court-martial is consistent with these principles.

Relford held that a serviceman may be court-martialed for a crime committed within the confines of a miltiary post that violates the security of a person or property. 401 U.S. at 369. See also *United States* v. *Smith*, 18 C.M.A. 609, 40 C.M.R. 321 (1969) (the sexual abuse of a minor may be prosecuted by a court-martial where that crime occurs within the confines of a military base). As the court of military review noted (Pet. App. 36a), however, this case is "unique" because there is no military base in Alaska for Coast Guard personnel or their families, even though the commander of that Coast Guard district has the same responsibility for their welfare that he would have if they lived on a military base. Thus, as the court of military review explained (*id.* at 35a-36a), it is reasonable to treat offenses committed against Coast Guard servicemen and their dependents in Juneau as if they were committed on a military base. The contrary result would unreasonably restrict the ability of the Juneau Coast Guard commander to protect military personnel and their dependents from offenses committed by servicemen. Because it is immaterial in the unusual circumstances of this case that the child abuse offenses charged against petitioner occurred in his home rather than on a military enclave, the lower courts' rulings are fully consistent with this Court's decision in *Relford*.

The lower courts were also correct in holding that the military's interest in "discipline and effectiveness" warranted the exercise of court-martial jurisdiction in this case (*Councilman*, 420 U.S. at 760).

In so ruling, the lower courts stressed several of the factors identified in *Relford*. One concern was that both victims of petitioner's sexual assaults were dependent children of fellow servicemen who were assigned to the same command as petitioner (Pet. App. 12a, 16a, 38a). See *Relford*, 401 U.S. at 366. The military has an obvious and substantial interest in being able to bring criminal charges against a serviceman for sexually abusing military dependents. This need is particularly evident in a service like the Coast Guard, which has crews who will be on missions at sea for extended periods, and whose officers and enlisted personnel must feel secure about the safety of their families in order to carry out their responsibilities while away from home. The Court of Military Appeals' conclusion about the adverse effects of this kind of crime on morale and discipline reflects precisely the type of expertise that this Court has stated is "singularly relevant" in determining whether a particular crime may be subject to court-martial jurisdiction. *Councilman*, 420 U.S. at 760. Cf. *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 4-5; *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981); *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976); *Burns* v. *Wilson*, 346 U.S. 137, 140-142 (1953).[6]

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[6] Petitioner criticizes (Pet. 15) the Court of Military Appeals' conclusion that the sexual child abuse charges against petitioner were likely to have an adverse effect on morale, on the ground that there was no support in the record for this conclusion. The Court of Military Appeals' conclusion, however, is eminently reasonable. Cf. *New York* v. *Ferber*, 458 U.S. 747, 756-760 (1982); see also *Chappell* v. *Wallace*, 462 U.S. 296, 302 (1983) (" '[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and

Additionally, the Alaska child abuse charges filed against petitioner did not stand alone. Petitioner was also charged with committing similar offenses against other military dependents on the Coast Guard base at Governors Island, New York (Pet. App. 3a), and those offenses were unquestionably subject to court-martial jurisdiction. See *Relford* v. *Commandant*, *supra*; *United States* v. *Smith*, *supra*. Accordingly, the Alaska charges were not isolated instances of misconduct; rather, the Alaska and New York child abuse offenses, "when viewed together, presents a pattern of behavior which poses a real threat to families now living in close proximity to the offender on-base at Governors Island" (Pet. App. 36a-37a) and "probably result[ed] from the same underlying motive or predisposition" (*id.* at 16a). Under these circumstances, the Coast Guard had a substantial interest in resolving all the charges in one proceeding, for a variety of reasons: (1) to allow petitioner to return to his assigned duties if he were exonerated, (2) to enhance the possibility of rehabilitation if he were convicted, (3) to enable the Governors Island Coast Guard commander to maintain order within his command, (4) to avert the disruptive effect of successive prosecutions on the ability of the servicemen fathers to carry out their military responsibilities, and (5) to lessen the need for the minor victims and their servicemen fathers to relive "a humiliating and degrading experience" [7] (*id.* at 15a-16a, 36a-38a). See *Relford*, 401 U.S.

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control of a military force are essentially professional military judgments' ") (quoting *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973)); *Goldman*, slip op. 6.

[7] *Morris* v. *Slappy*, 461 U.S. 1, 14 (1983).

at 367; see also *United States* v. *Lockwood*, 15 M.J. 1, 8 (C.M.A. 1983) (the presence of similar offenses that are clearly subject to the jurisdiction of a court-martial may be considered in determining whether other offenses may be tried by a court-martial).

Finally, the Court of Military Appeals found that the Alaska officials had a reduced interest in prosecuting petitioner (Pet. App. 14a, 16a). See *Councilman*, 420 U.S. at 760; *Relford*, 401 U.S. at 367-368. Neither petitioner nor his victims are now residents of that state, and the state prosecutors have decided to defer prosecution of petitioner to the military (Pet. App. 37a-38a; see also App., *infra*, 3a). This factor also lends support to the Court of Military Appeals' ruling in this case. See *Relford*, 401 U.S. at 367-368.

Petitioner does not claim that the decision below conflicts with the decision of any other court of appeals. Rather, the gravamen of his claim (Pet. 9, 16-17) is that the Court of Military Appeals held that the status of the victims as military dependents, by itself, was sufficient to allow him to be tried by a court-martial on the Alaska child abuse charges. However, neither court below adopted any such rule. Both military courts made clear that their decision was based on all the evidence in the record as well as the factors identified by this Court in *Relford* and *Councilman* (Pet. App. 9a-16a, 35a-38a). Accordingly, this case does not present the question whether the fact that the victim was a military dependent, without more, empowers a court-martial to adjudicate a criminal charge against a serviceman.

Relying on three 1969 decisions of the Court of Military Appeals holding that the offense of sexual child abuse is not subject to court-martial jurisdiction where the crime is not committed on a military

base,[8] petitioner also argues at length (Pet. 11-18) that the Court of Military Appeals' decision in this case constitutes an unreasonable expansion of court-martial jurisdiction. However, the alleged conflict among Court of Military Appeals' decisions is for that Court to resolve; it does not call for this Court's intervention. Moreover, petitioner's argument lacks merit.

Prior to its decision in this case, the Court of Military Appeals had clearly held that the offense of sexual abuse is subject to court-martial jurisdiction where that offense is committed on a military base. See *United States* v. *Smith*, *supra*. By contrast, in opinions rendered before this Court's 1971 decision in *Relford* v. *Commandant*, *supra*, the Court of Military Appeals had ruled that the crime of sexual abuse of a minor was not subject to a court-martial where that offense occurred outside a military base, on the ground that there must be some connection between the defendant's military duties and the crimes in question (*United States* v. *McGonigal*, 19 C.M.A. 94, 95, 41 C.M.R. 94, 95 (1969)). The decision in *Relford*, however, undermined the rationale used by the Court of Military Appeals in its prior opinions on this issue. *Relford* held that the status of a victim as the dependent of a serviceman is an important consideration in determining whether an offense can be subject to court-martial jurisdiction (401 U.S. at 366). *Relford* also rejected the argument that a crime must be connected with a serviceman's "military duties" before it can be tried by a

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[8] *United States* v. *Henderson*, 18 C.M.A. 601, 602, 40 C.M.R. 313, 314 (1969); *United States* v. *Shockley*, 18 C.M.A. 610, 611, 40 C.M.R. 322, 323 (1969); *United States* v. *McGonigal*, 19 C.M.A. 94, 94-95, 41 C.M.R. 94, 94-95 (1969).

court-martial (*id.* at 363-364, 366, 369).[9] Accordingly, it was entirely proper for the Court of Military Appeals to reconsider its prior decisions in light of *Relford*.[10] In light of other post-*Relford* decisions by the Court of Military Appeals, the decision in this case can hardly be considered unexpected.

3. Petitioner also contends (Pet. 10-12) that, even if the lower courts correctly held that he can be prosecuted by a court-martial for the Alaska charges, this holding cannot be applied to him without violating due process, since it was unforeseeable at the time he committed those offenses. Petitioner's claim, however, is not properly before the Court at this time. Aside from the fact that his conviction and sentence are still subject to review by both lower courts on his direct appeal, petitioner did not raise his claim in any of the courts below and therefore may not raise it in this Court for the first time. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's claim lacks merit.

The cases on which petitioner relies, *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), and *Marks* v. *United States*, 430 U.S. 188 (1977), are inapposite. Both cases forbade the unforeseeable judicial expan-

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[9] In *Relford*, although the Court expressly found that "there was no connection between Relford's military duties and the crimes with which he was charged" (401 U.S. at 366), the Court nonetheless held that Relford could be tried by a court-martial (*id.* at 369).

[10] In *United States* v. *Trottier*, 9 M.J. 337, 340-342 (C.M.A. 1980), the court stated that *Relford* required it to reconsider its pre-*Relford* decisions, and in *United States* v. *Lockwood*, *supra*, the Court of Military Appeals ruled that the crime of forging a promissory note was subject to court-martial jurisdiction, even though it was committed off a military base.

sion of the substantive scope of a criminal statute to reach conduct that a person could not have reasonably believed was criminal at the time that he engaged in it.[11] Unlike the defendants in *Bouie* and *Marks*, however, petitioner clearly had ample warning that his alleged conduct was a crime. That conduct has been an offense under provisions of the Uniform Code of Military Justice that have remained unchanged since 1950,[12] and nothing in the decisions below expands or alters the definition of those crimes. Petitioner's conduct also violated Alaska law,[13] which renders untenable any claim that he could have believed that his conduct was innocent. See *United States* v. *Bass*, 404 U.S. 336, 348 n.15 (1971).

In this case, the lower courts simply held that a court-martial could properly exercise jurisdiction over petitioner for conduct that is manifestly criminal. Neither *O'Callahan* nor *Relford* held that the question whether a particluar crime charged against a

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[11] *Bouie* held that the Due Process Clause precluded the conviction of two black college students for their refusal to leave an "all-white" lunch counter where the "narrow and precise" (378 U.S. at 352) state criminal trespass statute under which they were charged on its face prohibited only the entry onto the property of another in violation of previously-given notice (*id.* at 349 n.1), and where, prior to the conduct at issue, that statute had never been construed to cover the refusal to leave the property of another (*id.* at 352). Similarly, *Marks* held that the standard for determining the constitutionality of obscene materials that was adopted in *Miller* v. *California*, 413 U.S. 15 (1973), could not be retroactively applied to conduct that occurred prior to the decision in that case (430 U.S. at 196-197).

[12] See Arts. 80, 120, 128, 134, UCMJ, 10 U.S.C. 880, 920, 928, 934.

[13] See Alaska Stat. §§ 11.41.410 to 11.41.470 (1983 & Supp. 1985).

serviceman can be tried in a military court-martial is an ingredient of the crime itself and must be set forth in a statute or established by the caselaw with the same degree of precision that is necessary for the elements of a crime. On the contrary, *Relford* and *Councilman* explicitly endorsed an "*ad hoc* approach" to the question whether a particular offense is "service-connected." 401 U.S. at 369; 420 U.S. at 760. Petitioner's reliance on *Bouie* and *Marks* is therefore misplaced.

In any event, the lower courts' rulings were not unforeseeable. At the time of the Alaska offenses, the sexual abuse of a minor on a military base was subject to court-martial jurisdiction, and the Court of Military Appeals had indicated that its pre-*Relford* decisions would be reconsidered in light of this Court's ruling in that case. As we have noted, the Court of Military Appeals made it clear after *Relford* that some off-base offenses would be subject to court-martial jurisdiction (*United States* v. *Lockwood*, *supra*). Because petitioner could have reasonably foreseen the lower courts' rulings in this case, there is no merit to his claim that he lacked adequate notice of the prospect that he might be tried before a court-martial. See *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984); *Lockett* v. *Ohio*, 438 U.S. 586, 597 (1978).[14] Accordingly, there is no justification for refusing to apply the lower courts' interpretation of *O'Callahan* and *Relford* to petitioner's case.

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[14] Petitioner does not suggest that he relied on the Court of Military Appeals' pre-*Relford* decisions at the time he engaged in the conduct at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

THOMAS J. DONLON
Lieutenant Commander
Appellate Government Counsel
Commandant (G-LMJ)
United States Coast Guard

MAY 1986

STATE OF ALASKA
DEPARTMENT OF LAW
CRIMINAL DIVISION/
FIRST JUDICIAL DISTRICT
OFFICE OF THE DISTRICT ATTORNEY

May 15, 1985

LCDR Frank E. Couper
United States Coast Guard
Third District
Governor's Island, New York 10004

Re: YN1 Solorio

Dear Mr. Couper:

Please be advised that at this time, subject of future evaluation or developments, that the Department of Law, Criminal Division, State of Alaska, will defer the prosecution of Yeoman First Class Richard Solorio, United States Coast Guard, to the legal prosecutorial arm of the Coast Guard. The bases for this decision are contained below.

It is my understanding that the Coast Guard has transferred the victims to the East Coast making it difficult and expensive for the State of Alaska to divert scarce resources to investigate and to prosecute the offenses. Apparently, the Coast Guard has a policy of transferring its personnel periodically, and when such transfers permit criminal offenders to distance themselves from civilian authorities, the Coast Guard has a special interest in seeing that its

transfer policies do not permit criminal acts to go unpunished.

The Coast Guard has charged Solorio with other offenses involving child abuse that allegedly occurred on a Coast Guard installation at Governor's Island, New York. Considerations of judicial economy call for adjudicating all similar charges in one forum. Requiring child witnesses and their families to travel and testify in both New York and Alaska would be an unreasonable financial and administrative burden on both the Coast Guard and the State of Alaska as well as a personal burden on the families of the victims.

The alleged offenses in both Governor's Island and Juneau, Alaska were investigated by Coast Guard personnel. Because, at this time, no civilian child victims of prosecutable cases have been located, and all child victims are Coast Guard dependents, I believe that the Coast Guard has the greater interest in investigating and prosecuting both the Governor's Island and the Juneau charges.

It has been determined that the fathers of the victims who lived in Juneau were all assigned to the same Coast Guard command, the office of the Seventeenth Coast Guard District in Juneau, Alaska. The fathers were all rated Yeoman in the Coast Guard performing duties similar to Solorio's duties. Solorio knew that the female children who were allegedly abused were Coast Guard dependents because he worked with, played sports with, commuted with, and/or socialized with their fathers. Such alleged crimes, committed within the "Coast Guard family", affect the morale of Coast Guard personnel and their

working relationships on the job. The offense of child sexual abuse by a Coast Guard man damages the reputation of the Coast Guard in general, and Coast Guard personnel in particular. These various unique effects that the crime of child sexual abuse can have on service personnel and their families creates a distinct military interest that would not be fully considered in any state prosecution.

Prosecution by both the State of Alaska and the Coast Guard would pose numerous difficulties. Should both the state and the Coast Guard impose a sentence for similar crimes, the sentencing policies of a sentence of one trial may be negated by the sentence imposed by the other trial. Should one court favor rehabilitative sentencing and the other deterrent sentencing, neither policy would be accomplished. Should a Coast Guard court decide to retain YN1 Solorio in the service, a trial in Alaska would remove him from useful military service in the Coast Guard for at least the duration of a trial and perhaps for the duration of a sentence to confinement. For these and other reasons, consideration of all similar or related crimes by one trial forum will produce a more complete presentation of all available facts on the merits of the charges, and a more rational and integrated sentencing policy should there be guilty findings.

Because of these reasons, this office defers to the prosecution of YN1 Solorio by the Coast Guard for various alleged acts of attempted rape, indecent liberties, indecent acts, and indecent assaults against Amber Johnson and Jennifer Grantz which occurred at Solorio's residence at 8916 Birch Lane, Juneau, Alaska.

Please feel free to contact me if you have any questions.

Sincerely,

NORMAN C. GORSUCH
Attorney General

By:
LOUIS JAMES MENENDEZ
Assistant District Attorney

cc: CDR Thomas Barrett (CCGD17)
Richard Svobodny, District Attorney
Sgt. Robin Lown, AST

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